No. 87-367

In The
Supreme Court of the United States
October Term, 1987

—o—

BENDIX AUTOLITE CORPORATION,
Appellant,

v.

MIDWESCO ENTERPRISES, INC.,
Appellee,

INTERNATIONAL BOILER WORKS COMPANY,
Third-Party Defendant.

—o—

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

—o—

MOTION TO AFFIRM

—o—

IRA J. BORNSTEIN
Counsel of Record
HARVEY J. BARNETT &
ASSOCIATES, LTD.
200 North LaSalle Street
Chicago, Illinois 60601
(312) 782-1869

Attorney for Appellee

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether, by denying the benefit of the statute of limitations to corporations which are not licensed to do business in Ohio, the Ohio tolling statute, Ohio Rev. Code § 2305.15, violates the Commerce Clause as applied to Midwesco Enterprises, Inc.

2. Whether the fact that the parties to the contract could have included a provision naming an agent to receive process, which in fact was not done, can avoid the Ohio tolling statute's unconstitutional burden on interstate commerce.

3. Whether the Court of Appeals acted correctly in refusing to entertain the argument, which was raised for the first time before it in the reply brief and which had never been raised in the District Court, that the ruling that the Ohio tolling statute was unconstitutional should have been given only prospective effect.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

No. 87-367

In The
Supreme Court of the United States
October Term, 1987

BENDIX AUTOLITE CORPORATION,
Appellant,

v.

MIDWESCO ENTERPRISES, INC.,
Appellee,

INTERNATIONAL BOILER WORKS COMPANY,
Third-Party Defendant.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION TO AFFIRM

Appellee, MIDWESCO ENTERPRISES, INC. ("Midwesco"), hereby moves to affirm the granting of summary judgment to Midwesco on the ground that the questions upon which the decision depends are so unsubstantial as to not require further argument.

COUNTERSTATEMENT OF THE CASE

Appellant filed its action against Midwesco on December 19, 1980 in the United States District Court for the Northern District of Ohio. It sought to recover damages arising out of the sale and installation of a coal-fired boiler system. Appellant began beneficial use of the boiler system on July 3, 1975.

Midwesco moved for summary judgment on the ground that appellant's action was barred by Ohio's statute of limitations. The applicable Ohio statute of limitations require that both contract claims and fraud claims be brought within four years. Ohio Rev. Code §§ 1302.98, 2305.09(*c*). Midwesco first contended that Ohio's tolling statute, Ohio Rev. Code § 2305.15, was inapplicable inasmuch as Midwesco was continually subject to the long arm jurisdiction of the Ohio courts. Midwesco further contended that the tolling statute was unconstitutional as violating both the Commerce Clause of the Constitution and the Fourteenth Amendment thereto.

The District Court's decision issued on April 27, 1983 held that Midwesco was subject to the tolling statute based upon a finding that Midwesco was "out of state" for purposes of the tolling statute. In its decision, the District Court held in abeyance Midwesco's arguments that the tolling statute was unconstitutional and granted the parties the right to seek leave of court to participate in oral arguments in *Copley v. Heil-Quaker Corp.*, No. C 82-512. *Copley*, which also raised the question of the constitutionality of the tolling statute, had been filed in the same district court and was pending at the time before the same judge.

Appellant conceded that Midwesco is an Illinois corporation with its principal place of business in Illinois. Midwesco is not authorized to do business in Ohio, maintained no corporate office or facility in Ohio and did not appoint an agent for service of process in Ohio.

On March 8, 1984, the District Court issued its decision in which it found that under Ohio law the only way that a foreign corporation such as Midwesco can appoint an agent for service of process within Ohio and thereby satisfy the tolling statute is by obtaining a license to do business in Ohio. The court thus held that the tolling statute violates the Commerce Clause and never reached Midwesco's additional argument that the tolling statute violates the Due Process Clause.

The District Court analyzed the tolling statute under both a *per se* test and a balancing test and held, under both standards, that it violates the Commerce Clause as applied to Midwesco. The court therefore granted Midwesco's motion for summary judgment inasmuch as the action was barred by the statute of limitations. Appellant never raised in the District Court the question of a contractual provision appointing an agent for service of process avoiding the effects of the tolling statute. Appellant also never raised in the District Court the question of the prospective application of the decision and the same was never considered by the court.

Appellant appealed the decision to the Court of Appeals which, in a decision reported at 820 F.2d 186, affirmed the District Court's decision granting Midwesco's motion for summary judgment. In so doing, the Court of Appeals agreed with the District Court and held that in

order for a foreign corporation to satisfy the tolling statute it must obtain a license to do business in Ohio requiring the appointment of an agent for service of process exposing the corporation to personal jurisdiction in the state courts. The Court of Appeals found this burden placed on foreign corporations engaged in interstate commerce to be a *per se* violation of the Commerce Clause. The Court of Appeals considered, and found unpersuasive, Bendix's contention that the Court need not find the tolling statute unconstitutionally burdensome because foreign corporations can appoint an agent to receive process in Ohio without formally registering to do business in the state. Finally, the Court of Appeals refused to consider Bendix's argument, raised for the first time in its reply brief on appeal, that the District Court's ruling should be given only prospective effect.

———o———

ARGUMENT

Appellant, as it has done throughout this litigation, relies upon *G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982), involving a statutory scheme nearly identical to that of Ohio. This Court reviewed and upheld the New Jersey tolling statute under the Equal Protection Clause of the Constitution. As to the question of the statute's validity under the Commerce Clause, this Court remanded the case because neither the District Court nor the Court of Appeals had directly addressed the issue and in order to determine whether, under New Jersey law, a foreign corporation could avoid the tolling statute without having

to become licensed to do business in the state. This latter question arose only because of what the Court perceived as an ambiguity in a footnote in the New Jersey Supreme Court's decision in *Velmohos v. Maren Engineering Corp.*, 83 N.J. 282, 416 A.2d 372 (1980). It was not, as appellant contends, due to confusion in the record.

Ironically, *Coons v. American Honda Motor Co.*, 94 N.J. 307, 462 A.2d 921 (1983), which is relied upon by both the Court of Appeals and the District Court in the present cause, is the culmination of this Court's remand in *Searle*. (*Id.* at 923) The New Jersey statutes which were at issue in *Coons* are practically identical to their Ohio counterparts at issue in the present cause: N.J.S.A. 2A:14-22 and Ohio Rev. Code § 2305.15, N.J.S.A. 14A:4-1 and Ohio Rev. Code § 1703.041 and New Jersey Rule 4:4-4(c)(1) and Ohio Civil Rule 4.2(6). Justice Powell, in his opinion in *Searle* concurring in part and dissenting in part, reviewed New Jersey law and determined "that foreign corporations may designate an agent for service of process only by obtaining a certificate of authority to do business." (455 U.S. at 419) Justice Powell's position was confirmed by the New Jersey Supreme Court in *Coons* which, after reviewing New Jersey's statutory scheme, held that a foreign corporation can gain the benefit of the statute of limitations *only* by receiving a certificate of authority to do business in New Jersey.

The *Coons* court then proceeded to review New Jersey's tolling statute in the light of well-established constitutional precedent. Among other cases, *Coons* cited this Court's decisions in *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20 (1974); *Dahnke-Walker Milling Co. v. Bondurant*,

257 U.S. 282 (1921); and *Sioux Remedy Co. v. Cope*, 235 U.S. 197 (1914), holding that a state cannot require foreign corporations engaged in interstate commerce to become licensed as a condition to obtaining access to the courts of the state. The *Coons* court (463 A.2d at 927) recognized that there is no fundamental right to a statute of limitations defense but proceeded to hold:

> That legislative control, however broad, must be subject to constitutional limits. The legislature cannot accomplish indirectly that which it could not do directly; it cannot, in effect, force licensure on foreign corporations dealing exclusively in interstate commerce by otherwise preventing them from gaining the benefit of the statute of limitations defense. The burden thus imposed on interstate commerce is unconstitutional.

The Supreme Court of New Jersey thus held that the tolling statute was a forced licensure provision which must be stricken as a *per se* violation of the Commerce Clause.[1]

This Court denied certiorari from the decision of the New Jersey Supreme Court in *Coons. Honda Motor Company, Ltd. v. Coons*, 469 U.S. 1123 (1985). The reasons cited by appellant for plenary consideration, which are lifted from Chief Justice Rehnquist's dissent from the denial of certiorari in *Coons*, are no more compelling now than they were then. Since the decision in the present matter is consistent with the decision in *Coons* there is no reason for this Court to give any further consideration to this matter. The Sixth Circuit approvingly cited *Coons*

---

[1] The Court also found that the New Jersey tolling statute would violate the Commerce Clause under a balancing analysis. (463 A.2d at 926, n. 7)

as well as the aforementioned Supreme Court decisions in holding that the burden placed on foreign corporations such as Midwesco constitutes a *per se* violation of the Commerce Clause. Furthermore, there is a striking lack of authority in appellant's jurisdictional statement for any of its contentions.

The Sixth Circuit found that the tolling statute forces a foreign corporation to choose between exposing itself to personal jurisdiction in Ohio's state courts by complying with the statute or remaining liable in perpetuity for all lawsuits containing state causes of action. (820 F.2d at 188) The reason for this is that the courts of Ohio are courts of general jurisdiction and personal service upon the Ohio agent would give the court jurisdiction over all transitory causes of action. *Perkins v. Benguet Consolidated Mining Co.*, 158 Ohio St. 145 (1952); *Mattone v. Argentina*, 123 Ohio St. 393 (1931); *Firestone Tire & Rubber Co. v. State Farm Mutual Automobile Ins. Co.*, 119 Ohio App. 116, 197 N.E.2d 379 (1963). Therefore, just as the *Coons* court recognized, this is not a question of the statute of limitations being found to be a fundamental right even though the specter of this is raised by appellant's paraphrasing the dissent from the denial of certiorari in *Honda*.

Appellant inaccurately characterizes the teaching of *Searle* as being the necessity of determining what means existed for complying with the Ohio tolling statute. That was neither the teaching nor the controlling issue in *Searle* but rather was raised merely because of what was perceived as being an ambiguity in New Jersey law arising out of a footnote in the *Velmohos* decision. Appellant also

incorrectly states that the lower courts herein failed to determine what means existed for complying with the Ohio tolling statute. The District Court, in reaching its decision, specifically found that, upon review of the Ohio statutory scheme, the only way for a foreign corporation to obtain the benefits of the statute of limitations was to become licensed to do business in the State of Ohio. This was the same conclusion reached by the court in *Coons*. The District Court's holding was affirmed by the Sixth Circuit.

This Court in *Searle* did not, as appellant contends, identify the controlling question to be whether compliance with the tolling statute could be achieved simply by filing a notice with the Secretary of State. In fact, no such statement is to be found anywhere in the *Searle* opinion. The relevant rule regarding service upon a corporation in Ohio is Ohio Civil Rule 4.2(6) which is identical to New Jersey Rule 4:4-4(c)(1) which was at issue in *Coons*. Upon review of New Jersey's statutory scheme, the New Jersey Supreme Court in *Coons* held that the benefit of the tolling statute could not be achieved simply by filing a notice with the Secretary of State. (463 A.2d at 924-925) *Coons* was approvingly cited by both the District Court and the Court of Appeals in this cause.

In an unsuccessful attempt at distinguishing New Jersey law, appellant contends that at the time of *Searle* the record included a letter from the Secretary of State advising that New Jersey offered no procedure for designating an agent apart from the registration statute. Appellant, however, fails to point out that the court in *Coons*, in referring to the opinion of the New Jersey Secretary

of State, stated that since *Searle* the Secretary of State "has acceded to the Attorney General's contrary position that in accordance with N.J.S.A. 14A:1-6(4) and N.J.S.A. 2A:14-22, a foreign corporation may file with the Secretary of State a notice designating a representative in New Jersey as its agent to accept service of process." (463 A.2d at 925) Despite the fact that both the Secretary of State and the Attorney General took positions to the contrary, the New Jersey Supreme Court held that a foreign corporation could designate an agent for service of process only by registering to do business in the state.

In attempting to contrast the law of New Jersey with that of Ohio, appellant contends that, unlike New Jersey, the Ohio Secretary of State's office furnished a letter regarding its acceptance of a proposed designation of agent without requiring a foreign corporation to obtain a license. It must first be pointed out that said letter was never filed in this cause but rather is part of the record in the *Heil-Quaker* case. More importantly, the District Court in *Heil-Quaker* carefully considered this argument and totally rejected the same while pointing out that during the course of the litigation the Secretary of State's opinion had changed—that the Ohio Secretary of State in a letter had stated that it may accept for filing a designation of statutory agent *only* for those foreign corporations duly licensed to transact business in Ohio. (Appellant's Appendix pp. 22A-24A)

The Court of Appeals, in considering the same argument, stated that Bendix's suggestion was "highly speculative and devoid of any statutory support." (820 F.2d at 189) There is no indication at all in the Sixth Circuit's

opinion that it was unable to resolve the state law issue as appellant contends. Rather, the Sixth Circuit held that Ohio's statutory scheme provided no support for appellant's argument.

Bendix next raises the argument, rejected by the Court of Appeals, that Midwesco *could have* designated an agent by contract. The Court of Appeals did not concede that *if* Midwesco had designated an agent that designation would have been effective. The Sixth Circuit merely acknowledged that Midwesco could have chosen to name an agent as part of its contract but went on to hold that "this fact alone in no way solves the problem of whether the tolling statute violates the Commerce Clause." (820 F.2d at 189) Midwesco in fact did *not* name an agent in its contract with appellant. Appellant thus raises a red herring in attempting to divert the Court's attention from the question of the tolling statute's violation of the Commerce Clause. Moreover, this same question was raised before the court in *Coons* and rejected by it. (463 A.2d at 923-924) In fact, appellant's argument simply parrots the dissent in *Coons*. (463 A.2d at 929-930) Justice Powell, in his opinion concurring in part and dissenting in part in *Searle*, similarly reviewed the issue within the context of the statutory scheme. As the Sixth Circuit in the instant cause agreed, the question of the designation of an agent must be viewed within the statutory scheme. Under the statutory scheme, a foreign corporation can designate an agent only by becoming licensed to transact business in Ohio. Ohio Rev. Code § 1703.041. Otherwise, a foreign corporation could easily circumvent the statutory scheme. The holding of the Sixth Circuit is in no way

contrary to the *Searle* decision, as appellant argues without any support.

Additionally, Midwesco could not have been forced to designate an agent in its contract with appellant. This would simply permit appellant to achieve indirectly that which has been declared unconstitutional under the tolling statute. Midwesco cannot be forced to waive the requirement that the Ohio courts have personal jurisdiction over it.

Without any support at all, appellant merely makes the naked statement that there is a substantial question as to the correctness of the Court of Appeals' refusal to consider whether the District Court's decision should have been applied only prospectively. Appellant cites no support for its position simply because there is none. Appellant first raised the issue in this litigation in its reply brief before the Sixth Circuit. For that reason, based upon a long established rule, the Court of Appeals refused to consider the issue. (820 F.2d at 189)

Not only was this issue raised for the first time on appeal in appellant's reply brief—it was never even raised before the District Court. As such, the District Court could not have ac d improperly in applying its decision to the case at hand. Furthermore, the decision holding that the tolling statute is an unconstitutional violation of the Commerce Clause was issued by the District Court in this very case. The District Court's holding must be applied in this case to avoid the bar against constitutional adjudications standing as mere dictum. *Stovall v. Denno*, 388 U.S. 293, 301 (1967); *Valdez v. Perini*, 474 F.2d 19, 21 (6th Cir. 1973).

———o———

CONCLUSION

The lower courts in this case simply applied well-established legal precedent. Appellant has failed to cite any authority for its contentions and has failed to establish that the issues are so substantial as to require plenary consideration. The granting of Midwesco's motion for summary judgment on the ground that this action is barred by the statute of limitations is correct, poses no question requiring further briefing and oral argument before this Court and should be affirmed.

Respectfully submitted,

IRA J. BORNSTEIN
Counsel of Record
HARVEY J. BARNETT &
ASSOCIATES, LTD.
200 North LaSalle Street
Chicago, Illinois 60601
(312) 782-1869

Attorney for Appellee